United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6150

In The

United States Court of Appeals

For The Second Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

vs.

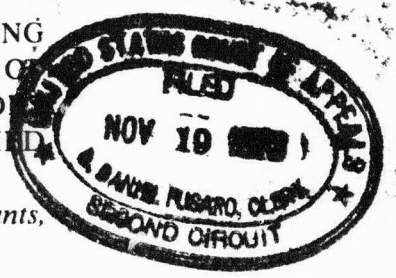
LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 15 INTERNATIONAL UNION OF OPERATING ENGINEERS, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK CITY, and ALLIED BUILDING METAL INDUSTRIES,
Defendants-Appellants,

and

THE IRON LEAGUE OF NEW YORK CITY, INC., THE CONSTRUCTION EQUIPMENT RENTAL ASSOCIATION, BUILDING CONTRACTORS' and MASON BUILDERS ASSOCIATION, THE CEMENT LEAGUE, STONE SETTING CONTRACTORS' ASSOCIATION, RIGGING CONTRACTORS ASSOCIATION, CONTRACTING PLASTERERS ASSOCIATION and EQUIPMENT SHOP EMPLOYERS,
Defendants,

and

JOSEPH ERSKINE and LAWRENCE MORRISON,
Appellants.



On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT ALLIED BUILDING METAL INDUSTRIES, INC.

HAROLD R. BASSEN
Attorney for Defendant-Appellant Allied Building Metal Industries, Inc.
211 East 43rd Street
New York, New York 10017
(212) OX 7-5551

(10164) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

Table of Contents

Cases Cited

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff-Appellee,

-against-

LOCAL 14, INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 15, INTER-
NATIONAL UNION OF OPERATING ENGINEERS, 76-6150
GENERAL CONTRACTORS ASSOCIATION OF
NEW YORK CITY, ALLIED BUILDING METAL
INDUSTRIES,

Defendants-Appellants,

-and-

THE IRON LEAGUE OF NEW YORK CITY, INC.,
THE CONSTRUCTION EQUIPMENT RENTAL
ASSOCIATION, BUILDING CONTRACTORS'
AND MASON BUILDERS ASSOCIATION, THE
CEMENT LEAGUE, STONE SETTING
CONTRACTORS' ASSOCIATION, RIGGING
CONTRACTORS ASSOCIATION, CONTRACTING
PLASTERERS ASSOCIATION and EQUIPMENT
SHOP EMPLOYERS,

Defendants,

-and-

JOSEPH ERSKINE, LAWRENCE MORRISON,

Appellants.

----------X

BRIEF FOR APPELLANT, ALLIED BUILDING METAL INDUSTRIES, INC.

ISSUES PRESENTED

1. Whether Allied was denied its constitutional right of due process when the trial court failed to give it an opportunity to be heard on the matters contained in the order and judgment which affected it.

STATEMENT OF THE CASE

Defendant-appellant, ALLIED BUILDING METAL INDUSTRIES, INC. (hereinafter called "Allied") appeals from the Order and Judgment of the United States District Court, Southern District of New York, dated September 1, 1976 (Tenney, J.) (JA pp 239-271)*. The grounds for such appeal are that the trial court below erred in failing to hold any hearings regarding the remedial relief that such court fashioned with respect to employers, such as Allied and its members, and in failing to provide Allied with an opportunity to offer evidence on the matters contained in such Order and Judgment which directly affected Allied and its members.

A. Facts Relating to Allied and Its Business Operations

Allied is an employer association which has been in existence since 1922. It has approximately fifty-seven

---

*All references are to pages in the Joint Appendix.

(57) members located in the greater metropolitan area. Such firms are engaged in either the fabrication or erection of steel or both such aspects of work. Those members of Allied engaged in the erection of steel have collective bargaining agreements with the various structural and ornamental ironworkers throughout such area, as well as with Local 14 and Local 15 of the Operating Engineers (JA pp 274-279).

It should be pointed out that in constructing a building, the steel is normally delivered to a jobsite by truck. Thereafter, the crew of iron workers sorts out the various columns and beams which are to be used in the structure. After the operator of the crane and the oiler have assembled the crane and put it into working order, the various pieces of steel are then lifted from the ground by such crane, which is operated by a member of Local 14 and serviced by an oiler, who is a member of Local 15, and are set into place by the iron workers. Needless to say, such work is extremely hazardous from the outset of construction. However, as the structure progresses upward the hazards increase. Often the crane operator cannot hear or see the members of the iron working crew to whom he is delivering the steel beam or column. In such cases, the delivery of the steel is directed by a series of complicated bell or

hand signals which are given to the crane operator by an experienced iron worker, who is sometimes thirty to fifty stories above the operator. The coordination between the operator of the crane and the signalman iron worker is, of course, crucial since the steel must be slung to both a height and inboard distance which will enable the iron working crew to grab the piece of steel and set it in its proper place without falling off the structure or being hit by the swinging piece of steel (JA pp 274-279).

The members of Allied engaged in the erection of steel structures invariably rent long-boom cranes or specialized cranes and derricks (hereinafter "equipment") from companies (hereinafter "vendors"). In addition to the rental of the equipment, the vendors are required to supply to the members of Allied an operator and an oiler (members of Local 14 and Local 15, respectively) who are thoroughly experienced in the erection of steel. It should be pointed out that the operator of the crane, as well as the oiler, become the employees of Allied's members as soon as the equipment is picked up by the operator and oiler for the account of the vendee. Additionally, the responsibility for each piece of rented equipment, which, in many instances, may be worth as much as $250,000.00 or more, devolves upon

the member of Allied, who is the vendee (JA pp 274-279).

At least four basic areas of risk are, therefore, assumed by a member of Allied that is engaged in steel erection: first, injury to the general public during the course of such operations; second, injury to its employees, particularly iron workers; third, damage to the vendor's equipment; and fourth, suffering economic loss by reason of not doing the job efficiently or within the time prescribed by contract (JA pp 274-279).

In connection with the areas of risk denominated as "second" and "fourth" above, it should be pointed out that the iron workers employed by the members of Allied that are engaged in steel erection have, in the past, walked off the job where the vendor has supplied an operating engineer who does not know how to safely and properly erect steel. It should be pointed out that such action by the iron workers to walk off the job was the sole decision of the iron workers and was predicated solely upon safety factors. In order to demonstrate to the Court that Allied's members were not supporting or acquiescing in any discriminatory practices, it should be noted that it costs the particular member of Allied upwards of $1,000.00 a day in lost wages, and, in addition, subjects such member of Allied to lost

profits, as well as liquidated damages for not completing the job on time. Historically, in order to safeguard against such situations, the members of Allied have insisted that vendors only provide them with operators who are experienced and competent in steel erection (JA pp 274-279).

In order to operate a crane in the City of New York, the operator of such crane must possess either an A* or a B* hoisting license issued by the City. However, there are many operators who possess such licenses but have never in their lifetime set steel or operated the type of cranes that are used in such operations. Unfortunately, under Judge Tenney's Order and Judgment dated September 1, 1976, the vendors must now call the joint hall maintained by the Unions herein for operators and oilers to operate each piece of rental equipment. If the Unions send out, as they must, an operating engineer from the sign-in sheet, who possesses the necessary license to operate the prescribed boom length of the crane involved, both the vendor and subsequently the Allied must accept such engineer even though he has never set steel or operated and assembled

---

*The designations A and B relate to the length of a boom on the crane that the operator is qualified to handle.

the type of derrick or crane* that is to be utilized on the job site (JA pp 274-279).

B. Prior Proceedings

On or about May, 1972, this Title VII action was commenced by the government against Locals 14 and 15 of the Operating Engineers, as well as various employer associations which had collective bargaining agreements with the aforementioned Unions. It should be pointed out, however, that the allegations in such complaint with respect to the various defendant employer associations did not in any way claim or allege any discriminatory practices against such defendant employer associations and merely claimed that such defendant employer associations were made parties defendants "for the purpose of relief only" pursuant to Rule 19(a) (JA pp 7-15). Thereafter, on or about September 16, 1974, the court below signed and entered a Pre-Trial Order in which it clearly stated in paragraph 1. thereof that the trial of the issues set forth in the government's complaint was for the purpose of determining "liability only" for any alleged discriminatory practices by the Unions. Moreover, during

---

*There are many different types of derricks and cranes, each having different controls and problems with respect to their operation and assemblage at the job site.

the early portion of the trial, the government and the General Contractors Association of New York City, Inc., a defendant employer association similar to Allied, entered into a stipulation, which was approved by the District Court, wherein and whereby it was agreed in substance that such defendant employer association was relieved from participating in the trial since it and other defendant employer associations were parties to such action for the purpose of relief only (JA pp 31-69). Again, this fact is clearly reflected in the opening paragraph of Judge Tenney's Opinion dated May 6, 1976 (JA p. 70).

Nevertheless, on September 1, 1976, the court below signed and entered an Order and Judgment which fashioned the remedial relief that affected not only the Union defendants herein, but the defendant employer associations, such as Allied, as well (JA pp 239-271). Although the court below held a conference on July 26, 1976, at which time all of the parties to the lawsuit were invited to attend, such conference, as the minutes clearly reflect, dealt with a discussion of the provisions of the government's proposed Order and Judgment (JA pp 128-203). At no time were the employer associations, such as Allied, given the opportunity to be heard on the relief that was being

fashioned nor were they permitted to provide the court below with any evidence relating to safety and efficient operations of their equipment (JA pp 128-203). Nevertheless, the court below by the terms of such Order and Judgment divested defendants, such as Allied, of its contractual rights under the terms of its collective bargaining agreements; imposed new and different regulations upon Allied and took away its control over the safety and economic use of its employees and their equipment (JA pp 239-271).

POINT I

ALLIED WAS DENIED ITS CONSTITUTIONAL RIGHT OF DUE PROCESS WHEN THE TRIAL COURT FAILED TO GIVE IT AN OPPORTUNITY TO BE HEARD ON THE MATTERS CONTAINED IN THE ORDER AND JUDGMENT WHICH AFFECTED IT.

As previously noted, Allied was not charged with any violations of Title VII by the government. It was merely a defendant for the purposes of any relief that might be necessary after the trial if it was determined that the Union defendants had violated Title VII. This understanding is made perfectly clear from a plain reading of the allegations contained in the government's complaint, the provisions

of the Pre-Trial Order and Judge Tenney's opinion (JA pp 7-15; p. 31; pp 70-71).

Allied was unable to put in any proof at the trial on the issues of hiring hall practices, safety and efficiency. Those issues insofar as Allied was concerned were not before the Court at the time of trial. Additionally, there was no opportunity during the period between May 6, 1976, when Judge Tenney's Opinion was rendered and the entry of Judgment on September 1, 1976, for Allied to submit any proof to the court on such matters or on the question as to how any proposed relief that the Court intended to fashion would adversely affect Allied with respect to such matters. Although a conference was held on July 26, 1976, between the parties to the suit and Judge Tenney, such conference, as the minutes clearly reflect, was not a hearing in the true sense of the word at which employer parties, such as Allied, had an opportunity to fully discuss the effect upon them of the proposals made by the government.

It is, we believe, clear that the provisions of the Order and Judgment have great impact upon the employer associations in the areas of hiring hall practices, safety and efficiency (JA pp 239-271). Under the Court ordered arrangement, Allied can no longer expect to be supplied with

operating engineers who have the requisite experience in (1) steel erection; (2) the operation of the particular types of derricks and cranes which are used in such operation; and (3) expertise with the safe and efficient operation of such equipment during the course of such operation.

At the present time, the vendor, who supplies to Allied both the derrick or crane and the crew to operate such equipment, must, pursuant to paragraph 30 of such Order and Judgment, obtain the crew from the hiring hall. Moreover, the Unions must, pursuant to paragraph 35(b),1, send out the first licensed derrick or crane operator and the first oiler on the hiring hall sheet irrespective of whether such individuals have ever set steel or operated the type of derrick or crane that is to be utilized on the particular job. In this connection it should be pointed out that neither the vendor, nor the contractor that ultimately receives the equipment and the crew has either the time, or the facilities to test a crew before it commences operation. Therefore, the safe and efficient operation of such equipment is, at present, left completely to chance since the employer has, by virtue of paragraphs 32-35 of the Order and Judgment below, been deprived of its former right to hire operating engineers who are skilled and experienced in its

type of operation (JA pp 239-271).

The sole point of contention in the instant case insofar as Allied is concerned is whether the court below without a hearing may determine the type of relief to be fashioned with respect to Allied's members. Allied believes that where, as here, an Order and Judgment is going to directly affect the very heart of the employers' operations, that due process requires that Allied should have been given the opportunity to participate in a fair and open hearing with respect to such matters so that it could apprise the court of the particular problems involved and propose methods of solving such problems. It is Allied's contention that an essential element of due process is an opportunity to be heard before the reaching of a judgment, that judgment without opportunity to be heard is judicial oppression. Londoner v. Denver, 210 U.S. 373 (1908), 52 L.Ed. 1103; Morgan v. United States, 304 U.S. 1 (1938), 82 L.Ed. 1129.

Preliminarily it is to be noted that in Title VII cases, such as this, where the court below has by the terms of its Pre-Trial Order directed a "split trial", there are two principal issues. The first is whether the operations of the defendant Unions have created violations of Title

VII. The second issue, which arises only upon an affirmative answer to the first, is what relief is to be fashioned to correct the discriminatory practices. No hearing need be held on the second issue - no determination thereof need be made - unless the first issue is determined in the affirmative. But if the first is determined in the affirmative, then there must be a hearing on the second, especially where, as here, Allied is directly affected by any such remedial relief. See, Federal Communications Commission v. National Broadcasting Co., Inc., 319 U.S. 239 (1943), 87 L.Ed. 1374; Wilson, Inc. v. Federal Communications Commission, 170 F.2d 793 (U.S.App.D.C. 1948).

The due process guarantee of hearing in our system of law has always been recognized as a right in persons, not a privilege to be extended to persons according to the ex parte judgment of courts as to whether or not there should be a hearing. That the due process guarantee of hearing on questions of law and fact means a right in persons, not a mere privilege to be extended to them by courts according to their ex parte judgment as to whether a hearing should be had, is illustrated in In re Galvin's Estate, 153 Misc. 11 (Surr.Ct., Monroe Cty. 1934), 274 N.Y.S. 846, which dealt with the right of both notice and hearing. There an

accounting executor was permitted by a Surrogate to dispense with service of citation upon a known creditor upon the theory that the latter could gain nothing by appearing and attacking a decree of that court. This was permitted under a statute providing that under named circumstances service of citation might be dispensed with, or, as the court said, authorizing the entry of an inconclusive decree without the obtaining of jurisdiction in the regular way. Discountenancing this statute under both the state and federal constitutions the court used these words:

> Each of the Constitutions guarantees to the citizen and only to him -- not to any court -- the privilege of saying whether or not he will be aggrieved by the proposed action of any court. This makes indispensable some preliminary notice, either actual or its presumptive equivalent, before the court acts; but the privilege not having been extended to the court, it cannot presume, or assume beforehand, without notice, what the citizen might or might not do were he notified. From this viewpoint of constitutional law, it is immaterial that in the judgment of the court he could not possibly be aggrieved by its proposed decree. The right is his and his alone to be judge of that before any court passes on it. It is a condition precedent to any court acting that the citizen shall have first had preliminary notice in one or other of the traditional forms, and an opportunity to be heard. [Emphasis supplied] [153 Misc. at 13, 274 N.Y.S. at 849]

Assuming, but not conceding, that Judge Tenney had broad discretionary powers granted to him by the courts in Title VII cases to fashion remedies in order to eliminate

discriminatory acts, Allied does not believe that such broad discretionary grants empowered Judge Tenney to completely ignore the constitutional requirements of a due process hearing with respect to the employer associations or empowered him to enter an ex parte judgment against such employer associations. Consequently, Allied urges this Court to hold that even in Title VII cases, the right to be heard with respect to any proposed remedial relief and the right to contest such proposals are equal and coexisting rights, and both are essential to procedural due process and that such rights were nullified in the instant case by the refusal to Allied of a fair hearing. See Morgan v. United States, supra.

CONCLUSION

FOR THE REASONS STATED HEREIN, THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS WITH RESPECT TO THE MATTERS CONTAINED IN THE ORDER AND JUDGMENT WHICH AFFECT ALLIED.

Respectfully submitted,

HAROLD R. BASSEN, ESQ.
Attorney for Allied
Building Metal
Industries, Inc.
211 East 43rd Street
New York, New York 10017
(212) OX 7-5551

HAROLD R. BASSEN,
Of Counsel

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,
- against -
LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS, et al
Defendants-Appellants.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Velma N. Howe, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 298 Macon Street, Brooklyn, New York 11216. That on the 19th *day of* November *1976 deponent served the annexed*

briefs *upon* 1. Joseph ERSKINE
2. DORAN, COLLERAN, O'HARA, POLK & DUNNE *attorney(s) for*

the parties *in this action, at* 1. 3513 Cooper Pl. BRONX, N.Y. 10475
2. 1461 FRANKLIN AVE. Garden City, N.Y.
the address designated by said attorney(s) for that purpose by depositing 2 *true copy(s) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 19th *day of* November *1976*

Beth A Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Velma N. Howe

Print name beneath signature

Velma N. Howe

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,
- against -
LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS, et al,
Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 19th *day of* November *19*76 *at* 1. 2401 E. Street, N.W. Washington DC
2. 330 Madison Ave. N.Y.C.
3. 900 17th St. N.W. Washington D.C.
4. 262 W. 24th St. N.Y.C.

deponent served the annexed briefs

upon
1. Equal Employment Opp. Commission - Attn: Mary-Helen Mautner
2. Shea, Gould, Climenko & Casey
3. Bonner, Thompson, Kaplan, O'Connell
4. Lawrence Morrison

the attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 19th *day of* November *19*76.

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Kevin E Thomas

Print name beneath signature

KEVIN E. THOMAS